

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BILLY GENE HOWARD,

Defendant.

No. CR03-2024-LRR

**REPORT AND
RECOMMENDATION ON MOTION
TO SUPPRESS**

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I. INTRODUCTION

In a superseding indictment filed in this case on July 21, 2003, the defendant Billy Gene Howard (“Howard”) is charged with two firearms offenses. (Doc. No. 16) In Count I, he is charged with possession of two shotguns after having been convicted on

four separate occasions of crimes punishable by imprisonment for more than one year, in violation of 18 U.S.C. § § 922(g) and 924(e). In Count II, he is charged with possession of the same shotguns knowing they had been stolen, in violation of 18 U.S.C. § § 922(j) and 924(a)(2).

This matter is before the court on Howard's motion to suppress evidence filed on July 7, 2003. (Doc. No. 13) Howard filed a brief in support of the motion on August 8, 2003.¹ (Doc. No. 21) The plaintiff (the "Government") filed its resistance to the motion and a supporting brief on July 14, 2003. (Doc. No. 14) The undersigned United States Magistrate Judge held a hearing on the motion on August 11, 2003. Assistant United States Attorney Peter E. Deegan, Jr. appeared on behalf of the Government. Howard appeared in person along with his attorney, John Broz.

The Government offered the testimony of Agent Scott Green of the Iowa Division of Narcotics Enforcement ("DNE"), and Officer Jerry M. Spencer of the Story City, Iowa, Police Department. The following exhibits were admitted into evidence: **Gov't Ex. 1**, "wanted person record" regarding Jimmy Lee Howard; **Gov't Ex. 2**, registration information for a brown 1983 Chevrolet van, license plate no. 164 JBT, titled in the name of Kelly Lynn Howard of Coralville, Iowa; **Gov't Ex. 3**, Iowa state search warrant papers for the search of a motel room at the Viking Motor Inn, Story City, Iowa, registered in the name of Bill Howard, and a brown 1983 Chevrolet van, license plate no. 164 JBT; **Gov't Ex. 4**, photograph of the brown Chevrolet van; **Gov't Ex. 5**, photograph of license plate no. 164 JBT on the brown van; **Gov't Ex. 6**, photograph of a glass pipe; **Gov't Ex. 7**, photograph of a two-way radio; **Gov't Ex. 8**, "attempt to locate" form regarding

¹The brief is untimely under Local Rule 7.1(d) ("If a brief is not filed on the same day as the motion it supports, it may be stricken by the court as untimely."). See LCrR 47.1(a). However, in the interests of justice, the court will consider the brief.

Jimmy Lee Howard, referencing a vehicle bearing Iowa license plate no. 164 JBT. Howard offered no evidence at the hearing.

The court now finds the motion has been fully submitted and is ready for consideration.

II. FACTUAL BACKGROUND

On December 21, 2001, a warrant was issued from Black Hawk County, Iowa, for the arrest of Jimmy Lee Howard (“Jimmy”) on a parole violation charge. The warrant was based on positive urinalysis samples submitted by Jimmy while on parole from a state conviction for possession with intent to distribute methamphetamine. Howard, the defendant in the present case, is Jimmy’s brother. Iowa DNE Agent Scott Green, who was investigating Jimmy and his associates on methamphetamine manufacturing charges, disseminated a “wanted person record” in an attempt to locate Jimmy. Agent Green was aware that Jimmy had an extensive criminal history, and he included in the notice an alert that Jimmy was “known to go armed.” (See Gov’t Ex. 1)

During their investigation, law enforcement had identified Dawn Hanawalt (“Hanawalt”) as an associate of Jimmy’s. Hanawalt had two prior felony drug convictions. In December 2001, Hanawalt was arrested on state methamphetamine manufacturing charges and released on bond. On January 14, 2002, Agent Green was contacted by an Assistant United States Attorney, who advised Agent Green that Hanawalt’s attorney wanted to talk to him. Agent Green call the attorney, who stated his client wanted to cooperate, and he provided a telephone number where Agent Green could call Hanawalt. Agent Green called the number and spoke to Hanawalt. She told Agent Green she would deliver Jimmy to law enforcement officers in Chickasaw County, Iowa. Agent Green gave Hanawalt his cell phone number, and then traveled to New

Hampton, in Chickasaw County, and made arrangements for a tactical team to make the arrest of Jimmy.

Agent Green waited for Hanawalt to call, but she never contacted him again. Instead, at about 1:30 p.m. on January 14, 2002, Agent Green received a telephone call from Dan Shilling ("Shilling"). Agent Green knew Shilling to be an ex-boyfriend of Hanawalt's who was involved in narcotics. Shilling advised Agent Green that he had dropped Hanawalt off at a mobile home in a trailer park in New Hampton, where Hanawalt was to meet Jimmy and another person who would be driving a red van. Agent Green drove to the trailer park, but found no red van. Agent Green then met with Shilling, who said he had "fucked up" by not contacting Agent Green earlier. Shilling stated he saw the red van traveling west on Highway 18. He only saw one person in the van, but he noted it bore a Johnson County, Iowa, license plate, number 164 JBT. Agent Green ran the plate, and determined it was registered to a brown 1983 Chevrolet van titled in the name of Kelly Lynn Howard of Coralville, Iowa. (See Gov't Ex. 2) Agent Green put out an "attempt to locate," stating Jimmy was believed to be "leaving New Hampton area at 1430 hrs this date possibly enroute [to] Mexico," in a brown or red 1983 Chevrolet van registered to Kelly Lynn Howard, and bearing license plate no. 164 JBT. The notice indicated the vehicle might be occupied by three people, and advised officers to "use caution" because Jimmy was "known to go armed." (See Gov't Ex. 8)

At 9:30 p.m., Shilling called Agent Green at his home. Shilling stated he had spoken with Hanawalt, who had told him she, Jimmy, and Howard were in a room at the Viking Motor Lodge in Story City, Iowa. Hanawalt had told Shilling that Jimmy and Howard made her go to the hotel with them. Shilling did not know the room number. Hanawalt said Jimmy was sleeping in the room, and she advised Shilling that it would be better if law enforcement waited until later to make the arrest. Agent Green asked

Shilling if he could find out the room number. Shilling called back a short time later and said they were in room number 51. Agent Green contacted the Story City Police Department and asked them to make the arrest, suggesting they use a tactical team from the Iowa State Patrol.

Story City Police Officer Jerry Spencer was dispatched to the motel. Officer Spencer was told there was an arrest warrant outstanding for Jimmy, Jimmy was traveling with Howard and a confidential informant in a brown Chevrolet van, the subjects were staying in room 51 at the Viking Motor Lodge, and he should consider Jimmy to be armed and dangerous. Officer Spencer arrived at the scene at 9:45 p.m., but he did not see the van. As he drove through the motel's parking lot in a marked police vehicle, he was approached by Hanawalt, who told him she was working with Agent Green. Hanawalt advised Officer Spencer that Jimmy was in the motel room, and Howard was driving the van around conducting surveillance. She confirmed that Jimmy was traveling to Mexico. Officer Spencer parked his vehicle out of sight, across the street from the motel. A short time later, he observed a brown van enter the motel parking lot, and Hanawalt identified the van as the one being driven by Howard. The driver parked the van and got out, and Hanawalt identified him as Howard. Officer Spencer notified his dispatcher, and waited for backup.

Officer Spencer watched while Howard paced in front of the motel for a few seconds and then enter the lobby. A short time later, Story County Sheriff's Deputy Mike Waldbilig arrived at the scene with a reserve officer. While Officer Spencer placed "stop sticks" behind the tires of the van, Deputy Waldbilig positioned his vehicle so the reserve officer could watch the ensuing events. Then Officer Spencer and Deputy Waldbilig approached the motel with their weapons drawn. Deputy Waldbilig observed Howard through one of the doors into the motel, and he motioned for Howard to open the door.

Howard complied, and the officers entered a hallway in the motel. Howard had a bag of chips and a motel key for room 51 in his hands. The officers told Howard they had a warrant for Jimmy's arrest. They had Howard place his hands on the wall, and conducted a pat-down search of Howard. Officer Spencer felt a hard object in a front pocket of the sweatshirt worn by Howard, and he thought it might be a knife. He asked Howard to identify the object. When Howard said he did not know what the object was and started to reach for it, Officer Spencer stopped him and removed the object from Howard's pocket. Officer Spencer recognized the object as a glass pipe of the type used to smoke illegal drugs. The officers placed Howard under arrest for possession of drug paraphernalia. The officers then searched Howard incident to the arrest, and discovered a two-way radio that was turned on. The officers handcuffed Howard to a door, and asked him if Jimmy was in the room. Howard replied that he was.

The officers then went to room 51 and knocked on the door, while Deputy Waldbilig announced "Sheriff's office" several times. When there was no response, the officers used the key they had taken from Howard and opened the door. They saw Jimmy lying on the bed. They also saw drug paraphernalia in plain view. They placed Jimmy under arrest, and in a search incident to his arrest, they found quantities of methamphetamine and marijuana.

The officers then obtained a state search warrant for the motel room and the van. Under the back seat of the van, the officers found the two shotguns that are the subject of the present charges against Howard. In the motel room, they discovered a receipt indicating Howard, and not Jimmy, had rented the room. They later confirmed this information with the hotel manager.

III. ANALYSIS

A. Pat-Down Search of Howard

The first issue concerns whether the officers had the right to conduct the initial pat-down search of Howard that led to his arrest on possession of drug paraphernalia charges. The analysis begins with the Fourth Amendment's guarantee of a person's right to be secure against unreasonable searches and seizures of his or her person, house, papers, and effects. The United States Supreme Court has held repeatedly that "searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334 (1993) (internal quotation marks, citations omitted).

One such exception arises when an officer "has a reasonable, articulable suspicion that [a] person may be armed and presently dangerous," in which case the officer may make "a limited, warrantless search for the protection of himself or others nearby in order to discover weapons." *United States v. Roggeman*, 279 F.3d 573, 577 (8th Cir. 2002) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889 (1968)). In *Roggeman*, the Eighth Circuit Court of Appeals explained the "reasonable suspicion" requirement in some detail, as follows:

The level of suspicion necessary to constitute reasonable suspicion that will, in turn, justify a protective pat-down search "is considerably less than proof of wrongdoing by a preponderance of the evidence" and "is obviously less demanding than that for probable cause." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). Nevertheless, the Fourth Amendment requires "some minimal level of objective justification." *Id.*; accord *Terry*, 392 U.S. at 27, 88 S. Ct. 1868 ("[I]n

determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”).

Reasonable suspicion is not a “finely-tuned” or bright-line standard; each case involving a determination of reasonable suspicion must be decided on its own facts. *Ornelas [v. United States]*, 517 U.S. [690,] 696, 116 S. Ct. 1657[, 134 L. Ed. 2d 911 (1996)]; *Terry*, 392 U.S. at 29, 88 S. Ct. 1868 (“[T]he limitations which the Fourth Amendment places upon a protective seizure and search for weapons . . . will have to be developed in the concrete factual circumstances of individual cases.”); *cf. United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981) (“Terms like ‘articulable reasons’ and ‘founded suspicion’ are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise.”). In order to determine whether the facts and circumstances surrounding a *Terry* search and seizure give rise to reasonable suspicion, “the totality of the circumstances -- the whole picture -- must be taken into account.” *Cortez*, 449 U.S. at 417, 101 S. Ct. 690.

Roggeman, 279 F.3d at 578. See also *United States v. Thomas*, 249 F.3d 725, 728 (8th Cir. 2001) (“During a *Terry* stop, officers can check for weapons and may take any additional steps that are ‘reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.’”) (quoting *United States v. Hensley*, 469 U.S. 221, 232, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985); *United States v. Doffin*, 791 F.2d 118, 120 (8th Cir. 1986)).

In the present case, the very nature of the crime under investigation provided reasonable suspicion that Howard might be armed. The officers were seeking a fugitive, Jimmy, and they had been advised to use caution because Jimmy was reported to be

armed and dangerous. *See Thomas*, 249 F.3d at 728 (“In deciding whether to conduct a *Terry* stop, an officer may rely on information provided by other officers conducting the investigation.”) (citing *United States v. Robinson*, 119 F.3d 663, 666-67 (8th Cir. 1997)). The officers had information from Hanawalt that Howard was assisting Jimmy in hiding from the police and fleeing the country, providing reasonable suspicion that Howard was involved in criminal activity. *See United States v. Davis*, 202 F.3d 1060, 1062 (8th Cir. 2000) (“[A] protective frisk must . . . be based upon reasonable suspicion that criminal activity is afoot.”). These facts warranted a heightened degree of vigilance on the officers’ part when they approached Howard. *Cf. United States v. Ramires*, 307 F.3d 713, 716 (8th Cir. 2002) (*Terry* stop justified when “police were investigating drug activity, which frequently involves weapons”); *United States v. Thevis*, 469 F. Supp. 490, 512 (D. Conn. 1979) (upholding warrant to search safe deposit box based, in part, on nature of crime; box’s owner was attempting to procure false passport and cash to facilitate fugitive’s escape). The officers had legitimate contact with Howard, and as such they were entitled to “conduct a pat-down search to protect officer safety, regardless of whether there [was] also probable cause to arrest.”² *United States v. Menard*, 95 F.3d 9, 10-11 (8th Cir. 1996) (applying a totality-of-the-circumstances analysis pursuant to *United States v. Flett*, 806 F.2d 823 (8th Cir. 1986)) (citing *Terry*, 392 U.S. at 27, 32-33, 88 S. Ct. at ;1883, 1885-86 (Harlan, J., concurring), 34-35 (White, J., concurring)).

²Notably, under the present circumstances, the officers also likely had probable cause to arrest Howard, based on Hanawalt’s information that Howard was aiding a fugitive – his brother, Jimmy – in eluding apprehension and fleeing the jurisdiction. If the officers had probable cause to make such an arrest, then they could have searched Howard incident to the arrest.

Viewing the totality of the circumstances, the court finds the officers reasonably believed their safety could be in danger from Howard. They were entitled to take reasonable steps to protect their personal safety during the course of their investigation. *See Thomas*, 249 F.3d at 728; *United States v. Doffin*, 791 F.2d 118, 120 (8th Cir. 1986)). The scope of the pat-down search was “confined to a search reasonably designed to discover concealed weapons.” *Roggeman*, 279 F.3d at 577. Under these circumstances, the court finds the pat-down search was warranted, and did not violate Howard’s Fourth Amendment rights. As the United States Supreme Court explained in *Terry*, “[T]he great risks that investigatory detentions present to officer safety tip the scales balancing the government’s interest in protecting law-enforcement officers against the individual’s right to personal security in favor of finding limited, protective searches to be constitutional.” *Roggeman*, 279 F.3d at 578 (citing *Terry*, 392 U.S. at 22-27, 88 S. Ct. at 1880-83).

B. Entry Into Motel Room

The issue is whether the arrest warrant for Jimmy provided the officers with legal authority to enter the motel room for the purpose of arresting Jimmy. “[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 1388-89, 63 L. Ed. 2d 639 (1980). *But see United States v. Steagald*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981) (absent exigent circumstances, entry into third person’s home is limited to search for subject of arrest warrant); *accord United States v. Risse*, 83 F.3d 212, 215-16 (8th Cir. 1996).

As the Eighth Circuit Court of Appeals explained in *Risse*, before entering a residence to execute an arrest warrant, an officer “must have a ‘*reasonable belief*’ that the suspect resides at the place to be entered . . . and [have] reason to believe that the suspect is present’ at the time the warrant is executed.” *Risse*, 83 F.3d at 216 (citations omitted).

In *United States v. Junkman*, 160 F.3d 1191, 1193 (8th Cir. 1998), the court considered the application of these principles in a case involving officers’ entry into a motel room to effect an arrest pursuant to a warrant. *Junkman* is directly on point in the present case. There, as here, the officers had a valid warrant for the arrest of someone they believed to be occupying a motel room with his brother. They entered the room for the purpose of finding the subject of the arrest warrant; however, they mistook the person named in the warrant for the brother who also occupied the room. The court held the mistake was irrelevant because the officers reasonably believed the subject of the warrant was a co-resident of the motel room and was present in the room at the time of the entry. *Junkman*, 160 F.3d at 1193-94. Because the officers believed the subject of the warrant was a co-resident of the motel room, the court held *Steagald* did not apply. *Junkman*, 160 F.3d at 1193 n.4. A similar analysis applies in this case.³

In the present case, the officers had a statement from an eyewitness, Hanawalt, that Jimmy was present in the motel room. They also reasonably believed Jimmy was a co-resident of the motel room based on Hanawalt’s statements. The court finds the valid

³The court also finds that, like *Junkman*, this case is further distinguishable from *Steagald* because the officers obtained a search warrant before searching the motel room, and the warrant was not obtained based on any illegal search of the room prior to obtaining the warrant. *See Junkman*, 160 F.3d at 1193-94 (citing *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984); *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)).

arrest warrant provided the officers with the legal authority to enter the room for the purpose of effecting Jimmy's arrest.⁴

C. Howard's Statement

Howard argues briefly that his affirmative response when the officers asked if Jimmy was in the motel room should be suppressed because it was made prior to any *Miranda* warnings being given, and after he was in custody. (See Doc. No. 21, p. 4) Howard apparently believes that if he had not responded to the question, the officers would not have entered the motel room, found items in plain view that led to issuance of the search warrant, and ultimately found the guns in the van. As discussed above, the evidence shows the officers would have entered the motel room in any event because they had independent, eyewitness statements that Jimmy was present in the motel room, and exigent circumstances existed to support entry into the room. Furthermore, their question to Howard as to whether Jimmy was present in the room falls within the “‘public safety’ exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence[.]” *New York v. Quarles*, 467 U.S. 649, 655-56, 104 S. Ct. 2626, 2631, 81 L. Ed. 2d 550 (1984) (pre-*Miranda* questions permissible when “reasonably prompted by a concern for public safety,” particularly in situation “where spontaneity rather than adherence to a police manual is necessarily the order of the day”). The court finds the statement should not be suppressed.

⁴Furthermore, even if the officers had lacked the authority under *Payton* and *Junkman* to enter the motel room, the discovery of the active two-way radio in Howard’s possession represented an exigent circumstance that provided the requisite authority. It would have been reasonable to believe Howard had alerted Jimmy to the officers’ presence, making it important for the officers to enter the room immediately.

D. Validity of the Search Warrant

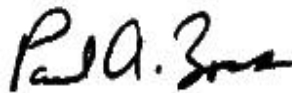
At the suppression hearing, Howard's counsel clarified that in the motion to suppress, he is challenging the validity of the search warrant only on the basis that it was obtained using illegally-obtained evidence. This position is based on arguments previously addressed and dismissed in this opinion. In any event, the court finds the warrant was supported by probable cause, and even if probable cause had been lacking, the officers who obtained and executed the warrant acted reasonably and in good faith. *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

IV. CONCLUSION

Considering the totality of the circumstances, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections⁵ to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Howard's motion to suppress evidence (Doc. No.20) be **denied**.

IT IS SO ORDERED.

DATED this 14th day of August, 2003.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

⁵Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).